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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-147

FEDERAL EMPLOYEES FOR NON-SMOKERS' RIGHTS, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners, Federal Employees for Non-smokers' Rights (FENSR), two other non-profit non-smokers' rights organizations, and 27 federal employees, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on May 2, 1979 and May 30, 1979.

OPINIONS BELOW

The May 2, 1979 judgment of the United States Court of Appeals for the District of Columbia has not been

reported. The judgment is reproduced as Appendix A. The Order of the Court of Appeals of May 30, 1979 denying petitioners' suggestion of a rehearing *en banc* is reproduced as Appendix B. The opinion of the United States District Court for the District of Columbia, dated March 1, 1978, has been reported at 446 F.Supp. 181, and is reproduced as Appendix C. The decision of the district court, dated April 2, 1978, has not been reported. It is reproduced as Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 2, 1979, a rehearing was denied on May 30, 1979, and this petition for certiorari was filed within 90 days of both dates. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in finding that the Occupational Safety and Health Act (OSHA) does not contain an implied equitable remedy for breaches of the duty of federal officers to provide federal employees a safe and healthful work environment.

2. Whether the Court of Appeals erred in finding that it had no jurisdiction over the common law claim against the federal government for failing to provide a safe and healthful work environment.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §668. PROGRAMS OF FEDERAL AGENCIES

Establishment, Development and Maintenance by Head of Each Federal Agency

(a) It shall be the responsibility of the head of each Federal agency to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under section 655 of this title. The head of each agency shall (after consultation with representatives of the employees thereof)—

(1) provide safe and healthful places and conditions of employment, consistent with the standards set under section 655 of this title;

(2) acquire, maintain, and require the use of safety equipment, personal protective equipment, and devices reasonably necessary to protect employees;

(3) keep adequate records of all occupational accidents and illnesses for proper evaluation and necessary correction action;

(4) consult with the Secretary with regard to the adequacy as to form and content of records kept pursuant to subsection (a)(3) of this section; and

(5) make an annual report to the Secretary with respect to occupational accidents and injuries and the agency's program under this section. Such report shall include any report submitted under section 7902(e)(2) of Title 5.

STATEMENT OF THE CASE

Petitioners filed suit in the United States District Court for the District of Columbia against the United States and the heads of major federal agencies seeking limitations on cigarette smoking in federal workplaces necessary to protect the health of federal employees. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights), 1346 (United States as a defendant), 1361 (action to compel officer of the United States to perform his duty), and 2201 and 2202 (declaratory judgment).

Petitioners' complaint alleged that the Federal Government (1) breached its common law duty to provide employees with a safe and healthful work environment (common law claim); and (2) breached the Occupational Safety and Health Act by failing to provide safe and healthful places and conditions of employment (OSHA claim).

The gravamen of petitioners' complaint is that tobacco smoke is a clear and present danger to health and is not merely a tolerable inconvenience or minor discomfort. Petitioners contend that tobacco smoking is associated with increased risk of lung, lip, oral, larynx, esophagus and bladder cancer; or coronary heart disease and stroke; and of such lung disorders as chronic bronchitis and emphysema. Petitioners further contend that as non-smokers they are exposed to these health hazards by being compelled *involuntarily* to inhale tobacco smoke at their workplace.

Petitioners requested that defendants be ordered to limit smoking to certain work areas so that federal employees can perform their functions without being forced to inhale and ingest harmful pollutants which are

not, of course, necessary by-products of the governmental process.

The district court dismissed petitioners' common law claim for lack of jurisdiction. The district court dismissed the petitioners' OSHA claim, ruling that the Occupational Safety and Health Act does not provide for a cause of action against federal employers. The Court of Appeals affirmed, without opinion, generally for the reasons stated in the district court's opinion.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN DENYING PETITIONERS' SUGGESTION FOR REHEARING TO RECONSIDER THE CASE IN LIGHT OF THE SUPREME COURT'S SUPERVENING DECISION IN *CANNON v. UNIVERSITY OF CHICAGO*

A. OSHA Contains an Implied Right of Action by Federal Employees for Injunctive and Declaratory Relief Against Unsafe and Unhealthful Working Conditions

In *Cannon v. University of Chicago*, 99 S.Ct. 1946, 1953-63 (1979), the Supreme Court refined the four factors of *Cort v. Ash*, 422 U.S. 66, 78 (1975), which are used as indicators of a congressional intent to make a remedy available to a special class of litigants. Those four factors are as follows: First, was the statute enacted for the benefit of a special class of which the plaintiff is a member? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? Fourth, is the cause of action one traditionally relegated to state law in an area basically the

concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

The present action satisfies all four of the enumerated factors indicative of a congressional intent to make a remedy available to plaintiffs.

1. *Petitioners are members of the protected class*

The threshold question under *Cort* is whether the statute was enacted for the benefit of a special class of which plaintiffs are members. The starting point is the language of the statute.

Section 19(a) of OSHA, 29 U.S.C. § 668(a), provides:

> It shall be the responsibility of the head of each Federal agency to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under section 6. The head of each agency shall (after consultation with representatives of the employees thereof)—
>
> (1) provide safe and healthful places and conditions of employment, consistent with the standards set under section 6;
>
> (2) acquire, maintain, and require the use of safety equipment, personal protective equipment, and devices reasonably necessary to protect employees;
>
> (3) keep adequate records of all occupational accidents and illnesses for proper evaluation and necessary corrective action;
>
> (4) consult with the Secretary with regard to the adequacy as to form and content of records kept pursuant to subsection (a)(3) of this section; and

> (5) make an annual report to the Secretary with respect to occupational accidents and injuries and the agency's program under this section. Such report shall include any report submitted under section 7902(e)(2) of title 5, United States Code.

The congressional intent underlying this subsection, as well as § 19(b) through (d), 29 U.S.C. § 668(b) and (c), is clearly to protect the health of federal employees. This legislative intent is indicated in the following excerpt from S. Rep. 91-1282, 91st Cong., 2d Sess. (Oct. 6, 1970), at 18-19:

> FEDERAL AGENCY SAFETY PROGRAMS AND RESPONSIBILITIES
>
> S. 2193 provides coverage for the approximately three million employees of the Federal Government. Section 17 *requires* Federal agencies to promulgate safety and health standards consistent with those developed by the Secretary of Labor for private industry. * * *
>
> During the past 25 years, there has been considerable improvement in the safety record of the Federal Government, but if it is to serve as a model employer, there must be an increased effort to achieve this ideal.
>
> In 1965, President Johnson launched the Mission Safety-70 program in an effort to dramatically reduce injuries among Federal employees. The plan envisioned a 30 percent reduction in the frequency rate of disabling injuries during the life of the program. In the first four years after the plan's initiation, the Government progressed only 10.4 percent toward its goal. Clearly, there is a significant margin of improvement yet to be achieved.
>
> In order to create a more effective safety program, the bill *directs* each Federal agency to purchase and

maintain safety devices and to require their use. Agencies must also keep adequate records and make an annual report on occupational accidents and illnesses to the Secretary. The Secretary, in turn, shall annually prepare and submit to the President for transmittal to Congress his evaluations and recommendations of the Federal safety program.

The above *requirements* are intended to establish *clear responsibility* for the Federal Government's internal safety and health efforts, and provide the Secretary with an active role in coordinating the multiplicity of programs devised by various agencies. Congress also will be offered an opportunity to learn of current health and safety conditions through annual reports. [Emphasis added.]

Similar language is contained in H. Rep. 91-1291, 91st Cong. 2d Sess. (July 9, 1970) at 33 (to accompany H.R. 16785, which was ultimately replaced by the substitute bill, H.R. 19200).

Moreover, as the Court in *Cannon* indicated, a statute limiting its applicability to an ascertainable, expressly identified class contrasts sharply with criminal statutes and other laws enacted for the protection of the general public. 99 S.Ct. at 1954. And, with only a single, unique exception the Supreme Court "has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case." *Id.* at n.13.

2. *There is no congressional intent to deny a private right of action*

As the Court observed in *Cannon*, "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or

ambiguous on the question." 99 S.Ct. at 1956. This is the case with the Occupational Safety and Health Act; the legislative history contains no mention of creating or denying private remedies for federal employees. Nevertheless, the Court in *Cannon* went on to quote from *Cort* that in cases "in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." *Id., quoting Cort, supra,* 422 U.S. at 82 (emphasis in original).

3. *Implying a private right of action is consistent with the purpose of OSHA*

The Court in *Cannon* recognized that, under *Cort,* a private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme. "On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." 99 S.Ct. at 1961 (footnote omitted).

Section 2(b) of OSHA, 29 U.S.C. § 651, expressly sets forth the purpose of the Act, and provides in pertinent part:

> (b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, *to assure* so far as possible every working man and woman in the Nation *safe and healthful working conditions* and to preserve our human resources— [Emphasis added.]

Actions such as the case at bar not only do not frustrate the purpose of the Act, but are essential to the

accomplishment of the Act's noble objectives. The language of § 19(a) contains a congressional directive to the approximately 120 departments and agencies of the Federal Government. This directive has been implemented by Exec. Order 11612, 36 Fed. Reg. 13,891 (1971) and Exec. Order 11807, 39 Fed. Reg. 35,559 (1974). It is also the subject of regulations of the Secretary of Labor, 29 C.F.R. Part 1960 (1979) and *Field Operations Manual* Ch. XIX (1979).

The implementation of § 19 has been a dismal failure. *See President's Report on Occupational Safety and Health Activities in the Federal Government, 1976* (1978). The goal of reducing injuries and illnesses of federal employees has not been achieved and, in fact, there has been an increase in work-related deaths and injuries. According to the most recent figures available, work-related fatalities increased from 104 in 1974 to 122 in 1976. Total injuries and illnesses reported increased from 121,052 in 1974 to 174,989 in 1976. *Occupational Safety and Health Statistics of the Federal Government, 1976* (OSHA 2066) (GPO 1978-261-017/34).

The dramatic increase in injuries and illnesses only occurred among Federal Government employees. *See U.S. Department of Labor, Occupational Injuries and Illnesses in the United States, by Industry, 1976* (1978). This difference can be attributed to the poor enforcement of the Federal Government program. *See Final Report of the Interagency Task Force on Workplace Safety and Health* (1978). Under § 19, the responsibility for safety and health matters rests with the head of each agency and the Secretary of Labor's authority is limited to coordination and consultation. § 19(a)(4) and (b). OSHA standards do not apply to federal workplaces; rather, standards must only be "consistent" with them. § 19(a)(1).

The Act provides private sector employees with several enforcement rights, such as the right to file a complaint with the Secretary of Labor, the right to seek a writ of mandamus in district court to compel the Secretary of Labor to conduct an inspection where there is imminent danger, and the right to participate in the inspection tour. *See* M. Rothstein, *Occupational Safety and Health Law* Ch.8 (West, 1978). Nevertheless, this does not mean that Congress did not intend to authorize actions by federal employees. As the Court explained in *Cannon:*

> The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section . . . .

99 S.Ct. at 1965.

Recent cases denying implied private remedies all had statutes providing for detailed enforcement of the rights they created.[1]

The present case, however, is different. Congress created express rights for federal employees in § 19(a) of OSHA and impliedly granted covered federal employees the right to enforce those rights through private actions.

As the Sixth Circuit recently observed:

> Congress was aware of the shortage of federal and state occupational safety inspectors, and placed

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[1] *See, e.g., Chrysler Corp. v. Brown,* ___ U.S. ___, 99 S.Ct. 1705 (1979) (Trade Secrets Act); *Cort v. Ash,* 422 U.S. 66 (1975) (criminal statute prohibiting illegal election contributions); *Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412 (1975) (Securities Investor Protection Act of 1970); *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453 (1974) (Rail Passenger Service Act of 1970); *Calhoon v. Harvey,* 379 U.S. 134 (1964) (Title IV of LMRDA).

> great reliance on employee assistance in enforcing [OSHA]. Furthermore, it is clear that without employee cooperation, even an army of inspectors could not keep America's work places safe.

Marshall v. Whirlpool Corp., 593 F.2d 715, 722 (6th Cir. 1979) (footnote omitted). To protect employees in the private sector, Congress intended employee cooperation to assist and augment the significantly increased number of federal and state inspectors authorized by the Act. For Federal Government employees, whose working conditions were not subject to any OSHA inspections or inspectors, Congress intended employees to have an even greater role in enforcement. Thus, a private action is implied in the statute.

4. *The case at bar is concerned exclusively with federal rights and remedies for which state court action would be inappropriate*

The employment relationship of federal employees is governed exclusively by federal law. 5 U.S.C. §§ 2101-8901. It is well settled that when federal law applies to a case, the federal courts must "fashion the governing rule of law according to their own standards." *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

Most importantly, under the Supremacy Clause, the state courts may not issue orders against the United States. Thus, an action for injunctive and declaratory relief against the Federal Government in its capacity as an employer may only be brought in United States District Court.

B. There Is Division Among the Circuits About Whether There Are Implied Rights of Action for Nonmonetary Relief Under OSHA

The case at bar is one of first impression. Nevertheless, it has been recognized in other contexts that Congress intended to create private federal remedies to redress rights expressly created in favor of employees under OSHA.

1. *The Sixth and Seventh Circuits have issued decisions suggesting the existence of implied rights of action*

Section 11(c)(1) of OSHA, 29 U.S.C. § 660(c)(1), provides as follows:

> (c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

The Secretary of Labor has issued a regulation, 29 C.F.R. § 1977.12, interpreting this provision as protecting an employee who withdraws from peril on the job based on a reasonable belief that there is a real danger of death or serious injury and there is insufficient time to eliminate the danger through regular channels.

In *Marshall v. Whirlpool Corp.*, 593 F.2d 715 (6th Cir. 1979), the Sixth Circuit upheld the validity of the regulation. Of significance to the present case, the court observed that even without the existence of the regulation it would have reached the same result by

finding that there was a private right of action implied in OSHA.

> We would be free on our own to reach the result of permitting an employee to withdraw from danger. . . . Indeed, the situation here is analogous to that in a series of cases which imply civil causes of action from statutes which otherwise do not provide for a specific civil remedy.

593 F.2d at 725 (footnote omitted). The court went on to explain in great detail the basis for its view that a civil remedy is implied in the statute.

> The policy factors which underlie cases allowing implied causes of action are applicable here, however. "It is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose." *J. I. Case Co. v. Borak*, 377 U.S. 426, 433, 84 S.Ct. 1555, 1560, 12 L.Ed.2d 423 (1964).

Id. at 725, n.22.

It should be noted that the court was prepared to find an implied remedy in favor of employees despite the fact that § 11(c)(2) and (3), 29 U.S.C. § 660(c)(2) and (3), specifically sets forth an administrative and judicial procedure for enforcement of rights granted under § 11(c)(1). According to the court, this procedure was not intended by Congress to be the exclusive method of enforcing § 11(c)(1) rights.

In a case factually closer to the one at bar, *Rambeau v. Dow*, 553 F.2d 32 (7th Cir. 1977), air traffic controllers at Chicago's O'Hare Airport brought an action against officials of the Federal Aviation Administration and Civil Service Commission. The plaintiffs claimed that the conditions of extreme stress under which they work

cause permanent damage to their health, thereby violating OSHA.

The Seventh Circuit affirmed the district court's dismissal of the action because the plaintiffs failed to exhaust administrative procedures specifically devised by the designated agencies. The court did not directly address the issue of whether a private cause of action would be available if administrative remedies were exhausted. Nevertheless, the court was much less troubled by providing a federal remedy than it was in requiring exhaustion of available procedures.

> At least for the present purposes we will accept the defense [Government] concession that if, as a matter of law, unsafe working conditions as alleged in the plaintiffs' complaint were a basis for a private cause of action,* and the preliminary administrative procedures necessary for exhaustion before resort to a private cause of action had been exhausted, then plaintiffs would not be precluded from resorting to that private cause of action merely because some of the factors involved were also subject to relief under a labor contract grievance procedure.

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*Counsel for the plaintiffs candidly conceded that he was unaware of any authority for a private cause of action under OSHA which would be available to the plaintiffs. The defendants' counsel did not supply any authority, however, to the contrary. Because the issue is not before us we express no opinion except that the issue may not be an easy one of resolution.

Id. at 34 & n.

The court went on to state:

> It may well be that upon the filing of a subsequent suit in which plaintiffs allege that they have exhausted administrative remedies and in which

> they make the Secretary of Labor a party, as the defendants contend they must do, that no better record will be established for the district court and no administrative expertise will be reflected in what comes before the district court. This possibility, however, in our mind gives us no basis to disagree with the requirement that before going into federal court the plaintiffs should have exhausted the procedures. . . .

Id. at 35.

In the present case, exhaustion of remedies is not an issue. The petitioners attempted to invoke all available procedures. Moreover, the defendants have never contended that the plaintiffs failed to exhaust administrative remedies or that any remedies were available.

2. *The Court of Appeals erred in construing as contrary precedent private actions for damages*

The Court of Appeals affirmed the district court's judgment on the pleadings for the defendants "generally for the reasons stated in [the district court's] memorandum opinion." In the district court's order of April 28, 1978, Judge Richey relied on § 4(b)(4) of OSHA, 29 U.S.C. § 653(b)(4), to hold that no private remedy is implied in the statute. Section 4(b)(4) provides:

> (4) Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

The court interpreted this section as precluding *any* private cause of action. It cited with approval *Byrd v. Fieldcrest Mills, Inc.*, 496 F.2d 1323 (4th Cir. 1974), *Russell v. Bartley*, 494 F.2d 334 (6th Cir. 1974), and several district court decisions refusing to imply private *damage* actions under OSHA. The Sixth Circuit, however, has recently explained that decisions refusing to permit damage actions should not be read broadly to preclude *all* implied causes of action under OSHA.

> It is true that this Circuit has held in *Russell v. Bartley*, 494 F.2d 334 (6th Cir. 1974), that no private cause of action arises from the Occupational Safety and Health Act. *Russell* is in accord with the view of other courts that both the express provisions of the Act (see 29 U.S.C. § 653(b)(4)) as well as the overall enforcement scheme (the Secretary of Labor bringing suits on behalf of aggrieved employees) indicated that Congress meant that no private cause of action for damages should arise. *See* e.g., *Skidmore v. Travelers Ins. Co.*, 356 F.Supp. 670 (E.D. La.), *aff'd* 483 F.2d 67 (5th Cir. 1973).

Marshall v. Whirlpool Corp., 593 F.2d 715, 725 n.22 (6th Cir. 1979). *See generally* M. Rothstein, *Occupational Safety and Health Law* § 523 (West 1978).

II. THE DECISION BELOW CONFLICTS WITH SUPREME COURT PRECEDENT ON THE EXISTENCE OF A FEDERAL COMMON LAW RIGHT OF ACTION

A. The Federal Government, as an Employer, Has a Common Law Duty To Furnish to Each Employee a Reasonably Safe and Healthful Place To Work

1. *All 50 states and the District of Columbia recognize the existence of the common law duty of employers*

Section 4(b)(4) of OSHA, 29 U.S.C. § 653(b)(4), makes it explicit that OSHA does not *diminish* the common law rights of employees. All 50 states and the District of Columbia follow the common law rule that an employer owes to each employee a reasonably safe and healthful place of employment. *See* Appendix E.

2. *The presence of cigarette smoke renders the workplace unsafe and unhealthful*

The harmful effects of cigarette smoke are well documented. Among other ailments, cigarette smoke causes lung cancer, emphysema, bronchitis, and heart disease. In 1965 Congress officially recognized the hazardous nature of cigarette smoke and declared a national policy of warning the public of these hazards to discourage smoking. Federal Cigarette Labeling and Advertising Act, P.L. 89-92, 79 Stat. 282 (1965). The public policy of discouraging smoking and limiting cigarette smoking to designated areas has continued with judicial approval. *See generally, Capital Broadcasting Co. v. Mitchell,* 405 U.S. 1000, *aff'g,* 333 F.Supp. 582 (D. D.C. 1971) (three

judge court); (upholding ban on cigarette advertising in electronic media); *National Association of Motor Bus Owners v. United States,* 370 F.Supp. 408 (D. D.C. 1974) (upholding restrictions on smoking on interstate buses).

3. *Respondent's common law duty extends to cigarette smoke*

Only one other reported case has involved an action for injunctive relief against cigarette smoke in the workplace. In *Shimp v. New Jersey Bell Telephone Co.,* 145 N.J. Super. 516, 368 A.2d 408 (Ch. Div. 1976), an employee who was allergic to cigarette smoke sought an injunction requiring the employer to prohibit smoking in general working areas. The court held that the action was not barred by the New Jersey Workmen's Compensation Act because only actions for damages are precluded. On the merits, the court held that the plaintiff had a common law right to a safe working environment that was violated by cigarette smoke. The employer was ordered "to provide safe working conditions for plaintiff by restricting the smoking of employees to the non-work area presently used as a lunchroom." 368 A.2d at 416.

Petitioners contend that the well reasoned decision in *Shimp* should be applied to federal employees.

B. The Right of Petitioners to Injunctive Relief Is Not Precluded by the Federal Employees' Compensation Act

In their brief before the court of appeals, respondents argue that the present action is preempted by the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 *et seq.* Neither the court of appeals nor the district court decided this issue. Nevertheless, in his Order of March 1,

1978, Judge Richey noted that the "exclusivity" provision of 5 U.S.C. § 8116(c) "appears only to apply to damage suits—not injunctive actions, as the one here." App. 11a, n. 2, *citing Galimi v. Jetco, Inc.*, 514 F.2d 949, 952-53 (2d Cir. 1975).

The legislative history of the FECA and the overwhelming weight of decisional law holds that the FECA only precludes damage suits. The congressional purpose in enacting the FECA was to provide federal employees with a swift, economical, and assured right of compensation for injuries arising out of the employment relationship, regardless of the negligence of the employee or fellow employees, or the lack of fault on the part of the United States. *Weyerhaueuser S.S. Co. v. United States*, 372 U.S. 597, 601 (1963).

Although there are no reported cases involving injunctive actions against the United States by employees, it has been held that the FECA does not preempt the common law right of an employee to sue another employee for negligence, *Bates v. Harp*, 573 F.2d 930 (6th Cir. 1978) or an action based on an implied contractual right to indemnification, *Travelers Insurance Co. v. United States*, 493 F.2d 881 (3d Cir. 1974).

The present action for injunctive and declaratory relief does not contain any threat of multiplicity of recovery or excessive governmental damage liability that the FECA was designed to preclude. Therefore, the action is not preempted by the FECA.

C. The United States Is Amenable to a Federal Common Law Action for Injunctive Relief in United States District Court Applying Federal Law

1. *There is a federal common law right to a reasonably safe and healthful place to work*

The existence of a common law duty, see Part II-A, *supra*, does not necessarily mean there is a *federal* common law duty. In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a "significant conflict between some federal policy or interest and the use of state law" must first be specifically shown." *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966).

Consequently, a federal policy or interest is required before the common law will be fashioned into a *federal* common law. There are several ways in which a significant federal policy or interest may be shown. One way to demonstrate the existence of a federal interest is for there to be a federal statute dealing with the general subject. *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 n.5 (1972), *citing Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). In the present case, the employment relationship of federal employees is the subject of numerous statutes codified at 5 U.S.C. §§2201-8901.

Another way in which a federal policy or interest may be shown is where the subject of the action has a vital effect on the powers and relations of the Federal Government. Thus, in a variety of actions where there were vital

federal interests, the Supreme Court and lower courts recognized a federal common law.[2]

The Supreme Court in *Wallis* indicated the need for a significant conflict between a federal policy or interest and the use of state law. The cases demonstrate that there can be no question about the importance of the federal interest in the relationship between the United States and its employees. Therefore, the remaining issue is the "conflict with state law."

It is impossible to know whether there is, in fact, a conflict with state substantive law. Although every state recognizes the common law duty of an employer to provide a reasonably safe place of employment, see Appendix E, only the *Shimp* case in New Jersey has decided the rights of employees to a smoke-free workplace. Nevertheless, in accordance with *Wallis*, there is a strong *potential* for conflict between federal and state law. This fact not only bolsters the need to recognize a federal common law in the federal employment relationship, but mandates that the federal common law be applied in order to promote uniformity among the states. *See infra.*

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[2]*E.g., United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-93 (1973) (suit by United States to quiet title); *Priebe & Sons v. United States*, 332 U.S. 407 (1947) (government contracts); *United States v. Standard Oil Co.*, 332 U.S. 301 (1947) (tort action by United States); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (rights and duties of United States on commercial paper); *Trans-Bay Engineers & Builders, Inc. v. Hills*, 551 F.2d 370 (D.C. Cir. 1976) (equitable rights based on HUD activities); *United States v. Carson*, 372 F.2d 429 (6th Cir. 1967) (tortious conversion of United States property); *Ghent v. Lynn*, 392 F.Supp. 879 (D. Conn. 1975) (contract claims against United States).

Finally, it is well settled that state laws may not be used to interfere with the operations of the Federal Government. *See, e.g., Johnson v. Maryland*, 254 U.S. 51 (1920). This constitutional problem underscores the need for a federal common law in federal employment.

2. *The interests of uniformity demand the application of federal common law to the instant case*

While the significant federal interests in the employment relationship give rise to a federal common law, the interests of uniformity demand that the federal common law *be applied* in the present case.

In the landmark case of *Clearfield Trust Co. v. United States*, 318 U.S. 364 (1943), the Supreme Court identified the compelling federal interest in uniformity.

> The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.

Id. at 367. *See also United States v. Terrey*, 554 F.2d 685, 692 (5th Cir. 1977).

In *Clearfield* the Court sought to avoid potentially inconsistent results by applying federal law. Similarly, federal law must be applied when the essential issue in the case involves federal fiscal policy. In *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), the Court held:

> The question, therefore, is chiefly one of federal fiscal policy, not of special or peculiar concern to the states or their citizens. And because those matters ordinarily are appropriate for uniform national treatment rather than diversified local disposition, as well where Congress has not acted affirmatively as where it has, they are more fittingly determinable by independent federal judicial decision than by reference to varying state policies.

Id. at 311.

The present case is precisely the type of action in which application of the federal common law is essential. The employer-employee relationship of federal employees is expressly and uniquely a creature of federal law. There are no local state interests expressed or implied. Uniformity of decision is essential to both the federal employees and the United States and the rights and remedies that could result from such an action would have a distinct and significant impact on federal fiscal and proprietary interests.

III. THE CASE AT BAR PRESENTS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE REVIEWED BY THE SUPREME COURT

The Occupational Safety and Health Act of 1970 (OSHA) is an important and sweeping piece of remedial legislation. The Act's purpose is to assure safe and healthful working conditions to every worker in the United States. The coverage of the Act is enormous—an estimated 65 million employees in 5 million workplaces.

Since the Act went into effect in 1971, the Supreme Court has decided only two cases arising under OSHA. Both cases involved a constitutional issue. In *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977), the Court

held that there is no right to a jury trial under the Seventh Amendment in an OSHA case. In *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), the Court held that the Fourth Amendment prohibits nonconsensual warrantless OSHA inspections. Recently, the Court granted certiorari in a third OSHA case, *OSHA v. American Petroleum Institute*, ___ U.S. ___, 47 U.S.L.W. 3554 (Feb. 20, 1979) (No. 78-911), to review the validity of the Secretary of Labor's OSHA standards promulgation procedures. In none of these cases has the Court been confronted with the issue of the statutory rights of public and private employees under OSHA.

The present case raises significant federal questions where resolution will have an extremely broad impact. First, the case concerns the rights of over 3 million federal employees to smoke-free workplaces. In deciding this question, the Court will determine for the first time whether Federal Government employees may bring similar actions to ensure the safety and health of their workplaces from a variety of hazards. Second, if upon remand it is held that there is a federal common law right to a smoke-free workplace, the impact is likely to be felt in the private sector. Common law injunctive actions in state court may be brought or there may be state or federal rulemaking to protect the rights of nonsmokers. Third, in deciding whether an action for injunctive relief is implied in OSHA, the Court's decision will affect other cases in which other implied rights and remedies under OSHA are alleged. Finally, in ruling on the present case the Court will address the wider issue of how broadly the courts should act to uphold the congressional mandate of a safe workplace and a safe environment.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1978

No. 78-1469

Civil Action No. 77-1059

[Filed May 2, 1979]

[No Opinion]

FEDERAL EMPLOYEES FOR NON-SMOKERS' RIGHTS, *et al.*,

Appellants

v.

UNITED STATES OF AMERICA, *et al.*

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, Chief Judge, TAMM, Circuit Judge, and AUBREY E. ROBINSON, JR.,* District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While

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*Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

This court is in agreement with the result reached by the District Court, generally for the reasons stated in its memorandum opinion. *See Federal Employees for Non-Smokers' Rights v. United States,* 446 F.Supp. 181 (D. D.C. 1978).

On consideration of the foregoing, it is **ORDERED** and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam

For the Court:

/s/ George A. Fisher
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1978

No. 78-1469

[Filed May 30, 1979]

FEDERAL EMPLOYEES FOR NON-SMOKERS' RIGHTS, *et al.*,

Appellants

v.

UNITED STATES OF AMERICA, *et al.*

BEFORE: Wright, Chief Judge; Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb, and Wilkey, Circuit Judges.

ORDER

The suggestion for rehearing *en banc* filed by appellants Federal Employees for Non-Smokers' Rights, *et al.*, having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, that appellants' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

/s/ George A. Fisher
Clerk

APPENDIX C

FEDERAL EMPLOYEES FOR NON-SMOKERS' RIGHTS (FENSR), *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Civ. A. No. 77-1059

United States District Court
District of Columbia

March 1, 1978

(Reported at 446 F. Supp. 181)

Joel D. Joseph, Paul D. Kamerar, Washington, D.C., for plaintiffs.

Barbara Allen Babcock, Asst. Atty. Gen., Earl J. Silbert, U.S. Atty., David J. Anderson, Catherine A. Ribnick, Washington, D.C., for defendants.

MEMORANDUM

CHARLES R. RICHEY, District Judge.

This case is before the Court on the plaintiffs' motion for summary judgment and the defendants' motion for judgment on the pleadings. For the reasons hereinafter stated, the Court finds that the defendants are entitled to a judgment on the pleadings as to counts 2 (29 U.S.C. § 668(a)), 3 (fifth amendment), and 4 (first amendment) of the complaint. The Court concludes that further briefing is required as to count 1 (common law claim).

In their complaint, plaintiffs allege injury as a result of the smoking permitted in the federal buildings of the defendants. Plaintiffs consist of several groups opposed to smoking and various nonsmokers employed by the federal government. They seek declaratory and injunctive relief restricting smoking to designated areas of the defendants' buildings and requiring the defendants to ensure that the indoor air quality in federal facilities is healthful and safe for federal employees. Plaintiffs assert four causes of action: (1) the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. § 668(a); (2) the first amendment to the Constitution; (3) the fifth amendment to the Constitution; and (4) the common-law duty of providing employees with a safe and healthful workplace.

I. THE OCCUPATIONAL SAFETY AND HEALTH ACT DOES NOT PROVIDE EMPLOYEES WITH A CAUSE OF ACTION AGAINST FEDERAL EMPLOYERS.

Plaintiffs argue that 29 U.S.C. § 668(a) of the OSH Act requires federal agencies to "provide safe and healthful places and conditions of employment . . . ." Because plaintiffs are the intended beneficiaries of the OSH Act, they contend, this creates a private cause of action enforceable in federal court. The defendants argue that Congress did not intend to create a private right of action under the OSH Act against these federal defendants, and none, therefore, should be implied. The Court agrees.

In determining whether a private cause of action can be implied from a statute, the Court must focus upon the language of the statute and, if unclear, the legislative history to ascertain whether Congress intended to allow private litigants to sue. *See National Railroad Passenger Corp. v. National Assoc. of Railroad Passengers*, 414 U.S.

453, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974); *J. I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964). Nowhere in the OSH Act, in its legislative history, nor in its statutory declaration of purpose and policy is there the slightest implication that Congress intended to create a private civil remedy against anyone because of a violation of the Act. *See Jeter v. St. Regis Paper Co.*, 507 F.2d 973 (5th Cir. 1975). In fact, the Act specifically provides that:

> Nothing in the chapter shall be construed to supersede, or in any manner affect any workmen's compensation law or to enlarge or diminish or *affect in any manner the common law or statutory rights, duties, or liabilities of employers and employees under any law* with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4) (emphasis added). Thus, the Act itself *precludes* this Court from implying a private cause of action because doing so would be to construe the Act in a manner that would affect the common-law rights of employers and employees by expanding the choice of actions a plaintiff may bring, by preventing common-law defenses from being asserted against a plaintiff, etc. *See Byrd v. Fieldcrest Mills, Inc.*, 496 F.2d 1323 (4th Cir. 1974); *Russell v. Bartley*, 494 F.2d 334 (6th Cir. 1974); *Buhler v. Marriott Hotels, Inc.*, 390 F.Supp. 999 (E.D. La. 1974); *Fawvor v. Texaco, Inc.*, 387 F.Supp. 626 (E.D. Tex. 1975); *Hare v. Federal Compress and Warehouse Co.*, 359 F.Supp. 214 (N.D. Miss. 1973); *Skidmore v. Travelers Ins. Co.*, 356 F.Supp. 670 (E.D. La.), *aff'd per curiam*, 483 F.2d 67 (5th Cir. 1973).

Moreover, the enforcement scheme of the OSH Act further indicates the congressional intent not to allow

employees to bring an action against a federal agency as an employer. The Act establishes an elaborate enforcement procedure in 29 U.S.C. § 659 that the Secretary of Labor may use against an "employer." However, the term "employer" does not include the United States. 29 U.S.C. § 652(5). Therefore, although 29 U.S.C. § 668(a) does require federal agencies to "provide safe and healthful places and conditions of employment," the Act confers no authority upon the Secretary to take enforcement action against federal agencies. The reason for this is that the federal agency area is one "in which ordinary enforcement and penalty provisions are hardly applicable." H.R. Rep. No. 90-1720, 90th Cong., 2d Sess. 20 (1968). If Congress did not intend the Secretary of Labor to enforce the OSH Act against federal agencies, then, *a fortiori*, Congress did not intend private litigants to enforce the OSH Act against federal agencies. Accordingly, the Court finds that the OSH Act does not create a private right of action against federal agencies.

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER THE FIRST AND FIFTH AMENDMENTS.

Plaintiffs contend that their first amendment right to petition their government for redress of grievances is infringed by the defendants' failure to make safe smoke-filled hallways, corridors, and meeting rooms. Furthermore, plaintiffs argue that the defendants have discriminated against them and denied them their life, liberty, and property without due process of law in violation of the fifth amendment.[1] The Court concludes

[1] The plaintiffs attempt to raise the Rehabilitation Act of 1973, 29 U.S.C. § 706, as a cause of action in their motion. However, they did not assert this statute in their complaint. Even if it

[footnote continued]

that the concerns plaintiffs address, though worthy of consideration in another forum, should not be elevated to a constitutional level. *See Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971) (environmental concerns are not constitutionally protected).

The Court is persuaded by the well-reasoned opinion of the Court in *Gasper v. Louisiana Stadium and Exposition District*, 418 F.Supp. 716 (E.D. La. 1976), that plaintiffs here have not stated a cause of action under the Constitution. In *Gasper*, plaintiff nonsmokers sought to enjoin the defendant from continuing to allow tobacco-smoking in the Louisiana Superdome. They claimed that the defendant's "permissive attitude" toward smoking violated their constitutional right "to breathe smoke-free air while in a State building." 418 F.Supp. at 717. Plaintiffs alleged a violation of the first amendment, in that the presence of tobacco smoke created a chilling effect on their right to receive information. In rejecting this argument, the court observed that there was no attempt by the state to restrict anyone's right to receive information or entertainment. Furthermore, the court

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were properly pleaded, the specific provision the plaintiffs cite is inapplicable because it relates only to discrimination against the handicapped in programs receiving federal financial assistance—not federal agencies. Also, this Act does not, as plaintiffs concede, expressly create a civil action for private litigants. Furthermore, the statute that does clearly protect against discrimination on the basis of a handicap in federal agencies, 5 U.S.C. §7153, only protects against an "adverse action" taken against an employee on account of his handicap. *See* 5 C.F.R. §713.401 (1977). This has been interpreted to ensure that handicapped individuals are afforded "equal opportunity in both job assignment and promotion." *See Ryan v. FDIC*, 565 F.2d 762, 763 (D.C. Cir. 1977). No such adverse personnel actions have been alleged in this case. For all these reasons, the Court finds that the plaintiffs cannot rely on the Rehabilitation Act.

noted, the presence of tobacco smoke had no more chilling effect on the first amendment than the selling of beer would have on those persons who refuse to attend events where alcoholic beverages are sold. 418 F.Supp. at 718.

The plaintiffs in *Gasper* also relied upon the fifth and fourteenth amendments. They argued that the state was depriving nonsmoking patrons of the Superdome of their life, liberty, and property without due process of law. Specifically, they asserted that the fifth amendment creates a "right to be free from hazardous tobacco smoke in State buildings." *Id.* The court, relying upon *Public Utilities Commission v. Pollak*, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068 (1952), rejected this argument. In *Pollak*, plaintiffs had charged that broadcasts over the loudspeakers of buses run by the Capital Transit Company, which operated pursuant to congressional authorization, infringed upon their first and fifth amendment rights. The Supreme Court there stated:

> This position [that only one passenger need object] wrongly assumes that the Fifth Amendment secures to each passenger on a public vehicle regulated by the Federal Government a right of privacy substantially equal to the privacy to which he is entitled in his own home. However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance. * * * The Federal Government in its regulation of them is not only entitled, but is required, to take into consideration the interests of all concerned. * * * The protection afforded to the liberty of the individual by the Fifth Amendment against the action of the Federal Government does not go that far. The liberty of each individual in a

> public vehicle or public place is subject to reasonable limitations in relation to the rights of others.

343 U.S. at 464, 465, 72 S.Ct. at 821. Consistent with the Supreme Court's language, the *Gasper* court concluded that:

> the courts have never seriously considered the right to a clean environment to be constitutionally protected under the Fifth and Fourteenth Amendments. It is well established that the Constitution does not provide judicial remedies for every social and economic ill. *Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972). Accordingly, if this Court were to recognize that the Fifth and Fourteenth Amendments provide the judicial means to prohibit smoking, it would be creating a legal avenue, heretofore unavailable, through which an individual could attempt to regulate the social habits of his neighbor. This Court is not prepared to accept the proposition that life-tenured members of the federal judiciary should engage in such basic adjustments of individual behavior and liberties.
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> * * *
>
> For the Constitution to be read to protect nonsmokers from inhaling tobacco smoke would be to broaden the rights of the Constitution to limits heretofore unheard of, and to engage in that type of adjustment of individual liberties better left to the people acting through legislative processes.

418 F.Supp. at 721-22. *See Hagedorn v. Union Carbide Corp.*, 363 F.Supp. 1061 (N.D. W.Va. 1973) (no constitutional cause of action for complaint alleging that emissions were fouling the air); *Environmental Defense Fund, Inc. v. Corps of Engineers of United States Army*, 325 F.Supp. 728 (E.D. Ark. 1971) (no constitutional cause of action for complaint seeking damages as a result

of exposure to air pollutants emitted from petroleum refineries).

This Court finds the facts of *Gasper* indistinguishable and will adopt its approach. Without in any way denigrating the importance of plaintiffs' environmental concerns, the Court firmly believes that such matters are better left to the legislative or administrative process, where a proper balancing of interests can be made in a forum where such social decisions can more appropriately be made. Accordingly, the Court finds that plaintiffs have failed to state a claim upon which relief can be granted under the first and fifth amendments to the Constitution.

III. ASSUMING THAT A COMMON LAW CAUSE OF ACTION EXISTS, THIS COURT MAY LACK JURISDICTION TO HEAR SUCH A CLAIM.

The plaintiffs contend that the defendants have breached their common-law duty to provide employees with a safe place to work. *See Shimp v. New Jersey Bell Telephone Co.*, 145 N.J. Super. 516, 368 A.2d 408 (1976). The defendants respond that where, as here, a federal employee asserts a claim against his employer, the United States, his exclusive remedy lies under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101, *et seq.* Without deciding this issue,[2] the Court notes that even if

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[2]Defendants rely upon 5 U.S.C. § 8116(c) which reads:

> (c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee . . . otherwise entitled to recover damages from the United States or the instrumen-

[footnote continued]

plaintiffs have a common-law action, this Court may lack jurisdiction to hear such claim. Therefore, the Court will order both sides to brief fully the issue of whether this Court has jurisdiction over such a common-law claim.

IV. CONCLUSION

The Court finds that plaintiffs have failed to state a cause of action under the Occupational Safety and Health Act of 1970, and have failed to state a claim upon which relief can be granted under the first amendment and the fifth amendment to the Constitution. Furthermore, the Court will withhold ruling upon the common-law claim until the issue is more fully briefed, pursuant to this Court's Order.

An Order in accordance with the foregoing will be issued of even date herewith.

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tality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute.

Although the Court will not decide this issue at this time, the Court notes that this provision appears only to apply to damage suits—not injunctive actions, as the one here. Congress' intent in enacting this law was to "provide adequate, fixed recoveries to its employees . . . [by] by paying substantial damages to [the government's] injured employees." *See Galimi v. Jetco, Inc.*, 514 F.2d 949, 952-53 (2d Cir. 1975). Therefore, it would seem that the Federal Employees' *Compensation* Act would not preclude this action which seeks merely injunctive relief.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 77-1059

[Filed April 28, 1978]

FEDERAL EMPLOYEES FOR NON-SMOKERS' RIGHTS (FENSR), *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

ORDER

Pursuant to this Court's Memorandum Opinion[1] issued on March 1, 1978, the parties have submitted memoranda on the issue of whether this Court lacks jurisdiction to hear plaintiffs' common law claim. Plaintiffs assert two bases for jurisdiction: (1) 28 U.S.C. § 1331 and (2) 28 U.S.C. § 1361.

(1) Section 1331 of Title 28 of the United States Code confers jurisdiction upon district courts for cases arising under the "laws . . . of the United States." Plain-

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[1]The Court notes that nothing in its Memorandum Opinion should be construed as addressing the issue of whether the Occupational Safety and Health Act of 1970 precludes judicial review of agency action. The Opinion only resolved the issue of whether the OSH Act created a private cause of action.

tiffs argue that the term "laws" includes federal common law and that the federal government's common-law duty to protect the health of employees[2] is a federal common-law duty. Upon consideration of the relevant authorities, the Court finds that the duty of the federal government to protect the health of their employees is not part of the federal common law. Courts have "developed" the federal common-law doctrine for those issues in which the federal interest is so strong that they are appropriately resolved on the basis of a *uniform* judge-made federal law, rather than on the basis of varying state laws. *See Molton, Allen & Williams, Inc. v. Harris,* 436 F.Supp. 853, 857 (D.D.C. 1977); 13 C. Wright and A. Miller, Federal Practice & Procedure 3563, at 422 (1975). No such federal interest can be found here: Although uniformity among states may be desirable, there is no necessity that a federal employer's duty to its employees in different states be decided by a uniform standard. The federal government in this case is involved not as the government *qua* government—but, rather, as an employer. As such, the interest in uniformity among federal agencies in different states is no greater than the same interest as it would apply to a private employer with branches of his business in different states. Accordingly, the duty of federal government to protect the health of its employees is not appropriately made a part of the federal common law, and, therefore, this Court lacks jurisdiction over this cause of action asserted under 28 U.S.C. § 1331.

(2) Section 1361 of Title 28 of the United States Code confers jurisdiction upon federal courts in the

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[2]For the purposes of this Order, the Court will assume, without deciding, that the complaint sets forth facts giving rise to a common-law duty of employers.

nature of mandamus to compel an officer of the United States to perform a duty owed to a plaintiff. Plaintiffs argue that the defendants owe them a common-law duty (as opposed to a federal common-law duty) to provide a safe and healthful work environment and that this case seeks to compel the defendants to perform this duty.

Mandamus jurisdiction will lie only when the duty prescribed arises from a statute or constitutional provision. *Cf. Mattern v. Weinberger,* 519 F.2d 150, 156 n.10 (3d Cir. 1975), *vacated on other grounds,* 425 U.S. 987 (1976). Because of this Court's resolution of plaintiffs' statutory and constitutional arguments, plaintiffs here can rely only upon a common-law duty and, therefore, § 1361 does not confer jurisdiction upon this Court.

It is, therefore, by the Court, this 27th day of April, 1978,

ORDERED, that plaintiffs' motion for summary judgment be, and the same hereby is, denied as to the first cause of action enumerated in the complaint; and it is

FURTHER ORDERED, that defendants' motion for judgment on the pleadings be, and the same hereby is, granted as to the first cause of action enumerated in the complaint; and it is

FURTHER ORDERED, that because of this Order and Memorandum Opinion issued on March 1, 1978, this case be, and the same hereby is, dismissed, with prejudice, and it is

FURTHER ORDERED, that each party shall bear its own costs in obtaining this judgment.

/s/ Charles R. Richey
United States District Judge

APPENDIX E

Alabama	Woodward Iron Company v. Craig 53 So.2d 586, 256 Ala. 37 (1951)
Alaska	Allen v. Knights Island Consol. Copper Co. 3 Alaska 651 (1909)
Arizona	Robles v. Preciado 79 P.2d 504, 52 Ariz. 113 (1938)
Arkansas	Norris v. Daves 470 S.W.2d 937, 251 Ark. 101 (1971)
California	Alber v. Owens 427 P.2d 781, 59 Cal. Rptr. 117 (1967)
Colorado	Williams v. Sleepy Hollow Mining Co. 86 P. 337, 37 Colo. 62 (1906)
Connecticut	Rescigno v. Rosner 198 A. 751, 124 Conn. 253 (1938)
Delaware	Finsaw v. Garstin 177 A.2d 636 (1962)
District of Columbia	Decatur v. Chas. H. Thompkins Co. 58 App. D.C. 102, 25 F.2d 526 (1928)
Florida	Hicks v. Kemp 79 So.2d 696 (1955)
Georgia	Holland v. McRae Oil & Fertilizer Co. 68 S.E. 555, 134 Ga. 678 (1910)
Hawaii	Michael v. Valdastri, Ltd. 575 P.2d 1299 (1978), 59 H. 53
Idaho	Deshazer v. Tompkins 404 P.2d 604, 89 Idaho 347 (1965)
Illinois	Mueller v. Elm Park Hotel Co. 75 N.E.2d 314, 398 Ill. 60 (1947)

Indiana	U.S. Cement Co. v. Cooper 88 N.E. 69, 172 Ind. 599 (1909)
Iowa	Davis v. Crook 261 N.W.2d 500 (1978)
Kansas	Uhlrig v. Shortt 397 P.2d 321 (1964), 194 Kan. 68
Kentucky	Burdette v. Thompson 420 S.W.2d 548 (1967)
Louisiana	Cambre v. White Castle Lumber Co. 81 So. 256, 144 La. 699 (1919)
Maine	Erickson v. Monson Consol. Slate Co. 60 A. 708, 100 Me. 107 (1905)
Maryland	Harrison v. Harrison 285 A.2d 590, 264 Md. 184 (1972)
Massachusetts	Reidy v. Crompton & Knowles Loom Works 60 N.E.2d 589, 318 Mass. 135 (1945)
Michigan	Dehtiar v. Mietkowski 127 N.W.2d 388 (1964)
Minnesota	Baumgartner v. Holslin 52 N.W.2d 763, 236 Minn. 235 (1952)
Mississippi	Long v. Woollard 163 So.2d 698 (1964), 249 Miss. 722
Missouri	Hightower v. Edwards 445 S.W.2d 273 (1969)
Montana	Pollard v. Todd, 418 P.2d 869, 148 Mont. 171 (1966)
Nebraska	Lownes v. Furman 71 N.W.2d 661, 161 Neb. 57 (1955)
Nevada	Pershing Quicksilver Co. v. Thiers 152 P.2d 432, 62 Nev. 382 (1944)

New Hampshire	Moore v. Morse & Malloy Shoe Co. 197 A. 707, 89 N.H. 332 (1938)
New Jersey	Clayton v. Ainsworth 4 A.2d 274, 122 N.J.L. 160 (1939)
New Mexico	Padilla v. Winsor 354 P.2d 740, 67 N.M. 267 (1960)
New York	Maleeny v. Standard Shipbuilding Corp. 142 N.E. 602 (1923), 237 N.Y. 250 (1923)
North Carolina	Jones v. Douglas Aircraft Co. 112 S.E.2d 257, 251 N.C. 832 (1960)
North Dakota	Abelstadt v. Johnson 170 N.W. 619, 41 N.D. 399 (1919)
Ohio	Lee v. Smith 42 Ohio St. 458, 51 Am. Rep. 839 (1884)
	Serdinak v. Overland Transp. Co. 181 N.E.2d 474 (Ohio App. 1961)
Oklahoma	McClendon v. McCall 481 P.2d 756 (1971)
Oregon	Concannon v. Oregon Portland Cement Co. 447 P.2d 290, 252 Or. 1 (1968)
Pennsylvania	Jerdon v. Sirulnik 162 A.2d 202, 400 Pa. 423 (1960)
Rhode Island	Faltineli v. Great American Atlantic & Pacific Tea Co., 182 A. 605, 55 R.I. 438 (1936)
South Carolina	Morgan v. Roper 157 S.E.2d 572, 250 S.C. 280 (1967)
South Dakota	Smith v. Community Co-Op Association of Murdo, 209 N.W.2d 891 (1973)

Tennessee	Virginia Iron, Coal & Coke Co. v. Hamilton 65 N.W. 401, 107 Tenn. 705 (1901)
Texas	Forley v. MM Cattle Co. 529 S.W.2d 751 (1975)
Utah	Speight v. Rocky Mountain Bell Telephone Co., 107 P. 742, 36 Utah 483 (1910)
Vermont	Landing v. Town of Fairlee 22 A.2d 179, 112 Vt. 127 (1941)
Virginia	Colonna Shipyard v. Bland 143 S.E. 729, 150 Va. 349 (1928)
Washington	Guy v. Northwest Bible College 390 P.2d 708 (1964), 64 W. 116
West Virginia	Bates v. Sirk 230 S.E.2d 738 (1976)
Wisconsin	Gordon v. Schultz Savo Stores, Inc. 196 N.W.2d 633, 54 Wis.2d 692 (1972)
Wyoming	Mellor v. Ten Sleep Cattle Co. 550 P.2d 500 (1976)

Supreme Court, U. S.
FILED
SEP 26 1979
MICHAEL RODAK, JR., CLERK

No. 79-147

In the Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL EMPLOYEES FOR NON-SMOKERS' RIGHTS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-147

FEDERAL EMPLOYEES FOR NON-SMOKERS' RIGHTS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported. The opinion of the district court entered on March 1, 1978 (Pet. App. 4a-12a) is reported at 446 F.Supp. 181. The order entered by the district court on April 28, 1978 (Pet. App. 13a-15a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1979. A petition for rehearing was denied on May 30, 1979 (Pet. App. 3a). The petition for a writ of certiorari was filed on July 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Occupational Safety and Health Act of 1970 (OSHA) provides a private right of action for declaratory and injunctive relief against federal employers.

2. Whether the district court properly dismissed petitioners' common law claim for lack of jurisdiction.

STATEMENT

Petitioners are several groups opposed to smoking and various non-smokers employed by the federal government. They seek declaratory and injunctive relief restricting tobacco smoking to designated work areas in all federal facilities, leaving other work areas free of tobacco smoke for the benefit of non-smoking employees. Petitioners asserted four causes of action in the district court based on: (1) the Occupational Safety and Health Act of 1970 (OSHA); (2) the First Amendment; (3) the Fifth Amendment; and (4) the common law duty of an employer to provide a healthful and safe work place.

The district court, on cross motions for summary judgment and judgment on the pleadings, dismissed petitioners' complaint. The court held that OSHA does not provide federal employees with a private right of action against their employer (Pet. App. 5a-7a) and that petitioners failed to state a claim upon which relief could be granted under either the First or Fifth Amendments (*id.* at 7a-11a).[1] The court also requested further briefing on the issue of its jurisdiction to consider petitioners' common law claim. Subsequently, the court held that it lacked jurisdiction to hear the common law claim and dismissed that portion of petitioners' complaint (*id.* at 13a-15a).

The court of appeals affirmed by judgment order for the reasons stated in the district court's opinion (Pet. App. 1a-2a).

ARGUMENT

1. Petitioners contend (Pet. 5-12) that OSHA, specifically 29 U.S.C. 668(a), contains an implied private right of action for declaratory and injunctive relief against the federal government for unhealthful working conditions. This contention is without merit.

First, it is well established that sovereign immunity prevents the United States from being sued without its consent. *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *Sherwood*,

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[1] Petitioners have not sought review here of the dismissal of their constitutional claims.

312 U.S. 584, 586 (1941). This consent will not be implied but must be "unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). Nothing in the language or legislative history of Section 668(a) suggests that Congress intended to waive the government's sovereign immunity.

Petitioners also cannot maintain this action against the other federal defendants. Clearly, OSHA does not expressly create a private cause of action. Thus, in determining whether the statute impliedly creates a private cause of action, the courts must consider the factors identified in *Cort* v. *Ash*, 422 U.S. 66 (1975), and further discussed in *Cannon* v. *University of Chicago*, No. 77-926 (May 14, 1979), and *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979). An assessment of these factors indicates that the district court correctly refused to find a cause of action implied in OSHA on behalf of petitioners.

The first factor identified in *Cort* is whether the plaintiff belongs to a class for whose special benefit the statute was enacted. OSHA is unquestionably intended for the protection of employees, but that fact alone does not suggest the existence of a private right of action. See *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 457-458 (1974). As the Court emphasized in *Cannon* (slip op. 11 n.13), and *Touche Ross & Co.* (slip op. 8), a court must look at the right- or duty-creating language of the statute in determining whether a private cause of action is implicit. In contrast to the cases relied on in *Cannon* (slip op. 11-13

n.13), the language of 29 U.S.C. 668(a) does not confer any rights on federal employees. Rather, it directs federal agencies to establish an occupational health and safety program. Congress' phrasing of the statute in this manner, as "a simple directive" to agency heads, strongly indicates its intent not to create a private remedy. See *Cannon* v. *University of Chicago*, *supra*, slip op. 14-15 n.14; *Touche Ross & Co.* v. *Redington*, *supra*, slip op. 8.

The other *Cort* factors point in the same direction. See *Cort* v. *Ash*, *supra*, 422 U.S. at 78. Petitioners do not claim that anything in the legislative history of OSHA supports their contention (Pet. 8-9). In fact, the legislative history and the entire statutory scheme are decidedly to the contrary. Congress considered and rejected the idea of applying the enforcement system established for private employers to federal agencies, choosing instead to direct the agencies to establish their own safety programs and specifically noting that federal employment "is an area in which ordinary enforcement and penalty provisions are hardly applicable." H.R. Rep. No. 1720, 90th Cong., 2d Sess. 20 (1968).[2]

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[2] Even though not subject to OSHA's enforcement procedures, the federal government has not taken its employee safety responsibilities lightly. The General Services Administration has provided direction to agencies whose buildings it maintains in the form of guidelines entitled "Smoking in GSA Controlled Buildings and Facilities," GSA Bulletin FPMR D-143, 41 Fed. Reg. 44476 (1976). In addition, GSA has recently promulgated regulations, effective April 16, 1979, restricting smoking in federal facilities so as "to pro-

This careful distinction drawn by Congress between private sector and federal employment is an important component of the OSHA statutory scheme, the purpose of which is to provide guarantees of employee safety and health through appropriate standards and enforcement. In providing these guarantees, Congress particularized the responsibilities of federal agencies in 29 U.S.C. 668(a), a provision separate and distinct from the remainder of OSHA, and deliberately refused to subject federal agencies to the coercive compliance measures that are applicable to private employers under 29 U.S.C. 657-659.[3] The manner in which agencies carry out their duties under OSHA is a matter of discretion.[4] Since Congress thus placed the government in a distinct, noncoerced position in the OSHA statutory scheme, it seems clear that Congress did not contemplate the ex-

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vide a reasonably smoke-free environment in certain areas for those working and visiting in GSA-controlled buildings." 44 Fed. Reg. 22464 (1979), revising 41 C.F.R. 101-20.109-10. The Department of Defense has issued its own instructions concerning the control of smoking (No. 6015.18, August 18, 1977, Attachment to Trial Record No. 18), as has the Department of Health, Education, and Welfare (General Administration Manual, Ch. 1-60, Addendum to Brief for Appellees in court of appeals).

[3] The enforcement provisions of OSHA apply to "employers," a defined term that explicitly excludes the United States. 29 U.S.C. 652(5).

[4] The Secretary of Labor has promulgated guidelines for the implementation of OSHA by federal agencies. 29 C.F.R. Part 1960.

posure of federal agencies to private suits by their employees based on mandatory OSHA obligations.

Finally, the subject matter addressed by OSHA indicates that a private federal remedy would be inappropriate. Employee health and safety have historically been subjects of state rather than federal concern, as shown by state tort law and workmen's compensation programs. As petitioners note (Pet. 18), all 50 states and the District of Columbia recognize a duty of employers to provide a safe place of employment. The decision of Congress to establish rules and provide benefits for federal employees does not alter the fact that employment conditions are basically of concern to the states.[5] In *Cannon*, in contrast, the statute dealt with an area traditionally covered by federal law, the prevention of invidious discrimination. Slip op. 29.

Petitioners' contention (Pet. 13-17) that the circuits are divided on the issue raised by this case is incorrect. No court has recognized a private right of action under OSHA. In *Rambeau* v. *Dow*, 553 F.2d 32 (7th Cir. 1977), the court did not ad-

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[5] Petitioners assert (Pet. 12) that a federal right of action is necessary because the Supremacy Clause bars state court injunctive or declaratory relief against the federal government as an employer. But the "necessity" of implying a federal remedy is irrelevant to the central inquiry, the intent of Congress. *Touche Ross & Co.* v. *Redington, supra*, slip op. 14-15. In this case, Congress did not intend to imply a private right of action against federal employers under OSHA. Thus, petitioners have the same options that they had before the passage of OSHA.

dress the question of an implied private remedy under the statute. In *Marshall* v. *Whirlpool Corp.*, 593 F.2d 715 (6th Cir. 1979), pet. for cert. pending, No. 78-1870, the court simply upheld the validity of a government regulation that limits the right of employers to discharge employees who refuse to work because of dangerous conditions. In reaching that conclusion, the Sixth Circuit cited approvingly its earlier decision in *Russell* v. *Bartley*, 494 F.2d 334 (1974), that no private cause of action arises under OSHA. 593 F.2d at 725 n.22. In fact, every court that has considered the issue has agreed that OSHA does not create a private remedy for unsafe or unhealthful working conditions. See *Byrd* v. *Fieldcrest Mills, Inc.*, 496 F.2d 1323 (4th Cir. 1974); *Russell* v. *Bartley, supra; Buhler* v. *Marriott Hotels, Inc.*, 390 F.Supp. 999 (E.D. La. 1974); *Fawvor* v. *Texaco, Inc.*, 387 F.Supp. 626 (E.D. Tex. 1975), rev'd on other grounds, 546 F.2d 636 (5th Cir. 1977); *Skidmore* v. *Travelers Ins. Co.*, 356 F.Supp. 670 (E.D. La.), aff'd, 483 F.2d 67 (5th Cir. 1973). See also *Jeter* v. *St. Regis Paper Co.*, 507 F.2d 973 (5th Cir. 1975); *Hare* v. *Federal Compress and Warehouse Co.*, 359 F. Supp. 214 (N.D. Miss. 1973).

2. Petitioners challenge (Pet. 18-24) the district court's determination that it lacked jurisdiction to hear their common law claim. Petitioners assert (Pet. 21-24) that jurisdiction exists under 28 U.S.C. 1331 because their claim involves an issue of federal

common law.[6] As the district court noted (Pet. App. 14a), however, the issue presented by petitioners is not of unique federal concern and does not require a uniform federal rule. The federal government's involvement in this case is simply as an employer. "As such," the district court observed, "the interest in uniformity among federal agencies in different states is no greater than the same interest as it would apply to a private employer with branches of his business in different states" (*ibid.*). The areas in which the Court has developed a federal common law have involved a complicated federal regulatory scheme, where federal judge-made law is necessary to fill the interstices of the statutory framework. See *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972); *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957). That is not the case here. Hence, petitioners' common law claim does not present a federal question, and the district court was without jurisdiction to hear it under 28 U.S.C. 1331.

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[6] Petitioners' attempt to invoke the mandamus jurisdiction of the district court under 28 U.S.C. 1361 (Pet. 4) was properly rejected by the district court (Pet. App. 14a-15a) and apparently is not renewed here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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